TOWARD POPULATION CONTROL:
PHILOSOPHICAL AND CONSTITUTIONAL ASPECTS
OF NATIONAL POPULATION POLICY

by

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Submitted in Partial Fulfillment

of the Requirements for the

Degree of Bachelor of Science

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

June, 1975

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Department of Urban Studies and Planning, May 16, 1975

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Accepted by .....
Chairman, Departmental Committee on Theses

ACKNOWLEDGEMENTS

I would like to thank the following people for their help and support:

Professor Len Buckle, my thesis advisor, who, along with Professor Sue Buckle, helped me not only with this project, but offered friendship, encouragement, and understanding throughout the last three years.

Dr. Louis Menand, under whose guidance during the summer of 1974 most of the research for this project was done. His continuing interest has been a great help. The many hours he spent with me discussing this project were both enjoyable and invaluable.

Ms. Susan Jackson, who typed patiently, even as last minute corrections were being made.

Ms. Nancy McTigue, whose encouragement made the completion of this thesis possible.

ABSTRACT

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There are both environmental and social reasons for requiring a drastic reduction of population growth - the ultimate goal being zero population growth. The idea of limiting a person's right to bear children, while at first seeming offensive, is not much different from the other kinds of social controls which government enforces. An examination of the concepts of descriptive liberty and emotive liberty show us that society can indeed exert many controls on our rights, even within a framework of freedom. As the needs of society change, more controls become necessary to insure maximum individual liberty.

Congress can find the authority to act in the field of population policy in Article I, section 8 of the Constitution, which describes the spending powers of the Legislature. However, given our present concepts of personal privacy and environmental quality, the courts may not recognize the necessary "compelling state interest" which is needed in order to interfere with a right as basic as that of procreation. Congress, through the National Environmental Policy Act of 1969, and the courts through a train of decisions leading up to Sierra Club v. Morton, have shown a realization of a possible constitutional right to a decent environment, but the Supreme Court's decision in Sierra made it clear that this right would not be recognized just yet.

To ask whether compulsory population control measures would presently be accepted by the Supreme Court is, however, to some degree, of little use. Insofar as the Court's decision usually reflect popular attitudes, given today's sentiment such measures would fail. But this type of appraisal has little significance, for the enactment of mandatory population legislation, in itself, would signify a broad change in public opinion, and thus open up any previous constitutional analysis to question. It is in the context

of the future setting that the constitutionality of such programs must be hypothesized.

A different way of thinking about our environment is necessary if we are to realize the government's overriding interest. Professor Stone's idea of assigning legal rights to natural objects would facilitate such a way of thought. Only when we come to realize the importance of privacy and individual liberty and environmental quality, and the relationship which excessive population growth has to these, will we be able to control our growth and free ourselves.

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CHAPTER ONE. WHY WORRY ABOUT POPULATION GROWTH?

The probability of the need for the development of a stable society which does not continue to make drastic demands on the world's resources is near certain in the foreseeable future. This development has been called a no-growth society, a stable society, a stagnant society, or a world ecological system which is in equilibrium. Whatever it is called, most serious students of Spaceship Earth are convinced of the necessity for controls on resource utilization, on economic and industrial growth, and on size and make-up of the world's population.

Of all future policies which must be conceived of and evolved, that which concerns population growth is probably the most complex. While studies of population and methods of family planning have made a significant contribution to understanding the dynamics of population change, control, and growth, there has been very little attention paid to the theoretical justification for and legal methods by which absolute limits on population can be instituted as matters of public policy within any given society. Given the theoretical background for a democratic society (the U.S.) and given the legal framework within which such a society functions, the idea of a mandate limiting population is bound to be controversial, for it attempts to exert control over an area which is most revered by Americans: the right to bear children.

This sacred right of procreation derives from a concept of personal liberties which has its origins in a time of growth and expansion. As population increases, and reserves of food and nonrenewable resources decrease, however, it grows necessary, as a matter of survival, to re-examine our ideas of privacy, and our obligations to our fellow man. Our responsibilities to others, we may find, might overshadow our right to reproduce.

This is, indeed, the case. While solely curbing the spiraling growth of population will not alleviate all of the pressures being exerted on our eco-system, such an action is a necessary first step. As with all of our other rights, that which allows us to bear children is not absolute, for one may exercise his free will only while his actions do not infringe upon the rights of others. And just as a company cannot deprive the public of a clean beach by depositing waste in a river, and a neighbor cannot deprive an individual of peace and quiet by making a nuisance of himself, nor can we, as members of a society which is over-crowded and without adequate resources, deprive our fellow citizens of the necessities of life by thoughtlessly contributing to the problem of overpopulation.

A national population policy which would limit growth is both necessary and proper.

The United States government officially recognized the possibility of the existance of a population problem with the formation of The Commision on Population Growth

and the American Future on March 16, 1970. In proposing this Commission in July, 1969, Richard Nixon said: "One of the most serious challenges to human destiny in the last third of this century will be the growth of the population. Whether man's response to that challenge will be a cause for pride or for despair in the year 2000 will depend very much on what we do today."

The Commission, in March, 1972, recommended, among other things that "recognizing that our population cannot grow indefinitely, and appreciating the advantages of moving now toward the stabilization of population, the ... nation (should) welcome and plan for a stabilized population."[1] Today, three years later, we are no closer to having a well-defined population policy.

On the eve of the nation's bicenntenial commemoration it is necessary not only to celebrate our past, but also to question our future. We are faced with problems of poverty, of careless exploitation of resources, of environmental deterioration, and of decaying cities and wasted countrysides. The longer we wait to address these issues, the more difficult it is to implemant their solutions. The time to act is now.

How Do We Grow?

Malthus begins his Essay on Population (1798) by postulating that "The passion between the sexes ... will

remain nearly in its present state,"[2] and finds, as a consequence, that population tends to increase geometrically. He has stated, very simply, the underlying element in the process of population growth: the sex urge. This desire, it is generally agreed, is very strong in most of us for most of our lives. This strength, argues Desmond Morris in The Naked Ape (1967), is no biological accident, nor is it "... some kind of sophisticated, decadent out-growth of modern civilization, but a deep-rooted, biologically based, and evolutionary (sic) sound tendency of our species."[3] The need for what he calls "pair bonding", which ensures a stable relationship between parents during the years that an infant is typically helpless, has caused man's sexuality to evolve and progress to the intensity that it has, therefore, is not only the means of creating living beings, but is also the "incentive" for the long and difficult task of protecting them and teaching them until they are old enough to fend for themselves. It should be noted here that no distinction is made between the reproductive urge and the sex urge. According to Morris' thesis, the desire to create babies and the desire for the activity which would normally create them is one and the same. It is sufficient to say that the sex urge is quite powerful, and that its natural outcome is reproduction.

We are all very familiar with the results of the phenomenon of reproduction. The size of the world population is evident to us; what is not apparent is the rate which it grows. Figure 1 shows the history of the world population

FIGURE 1.

World Population:
Time taken by the earth to
evolve each billion human beings.

Human billions	Year A.D.	Time taken (years)
1st	1830	4.5billion
2nd	1930	100
3rd	1960	30
4th	1975	15
5th	1987	12
6th	1995	8
7th	2000	5
8th		
9th		
10th		
11th		
12th		

Source: Porulation vs. Liberty, Jack Parsons

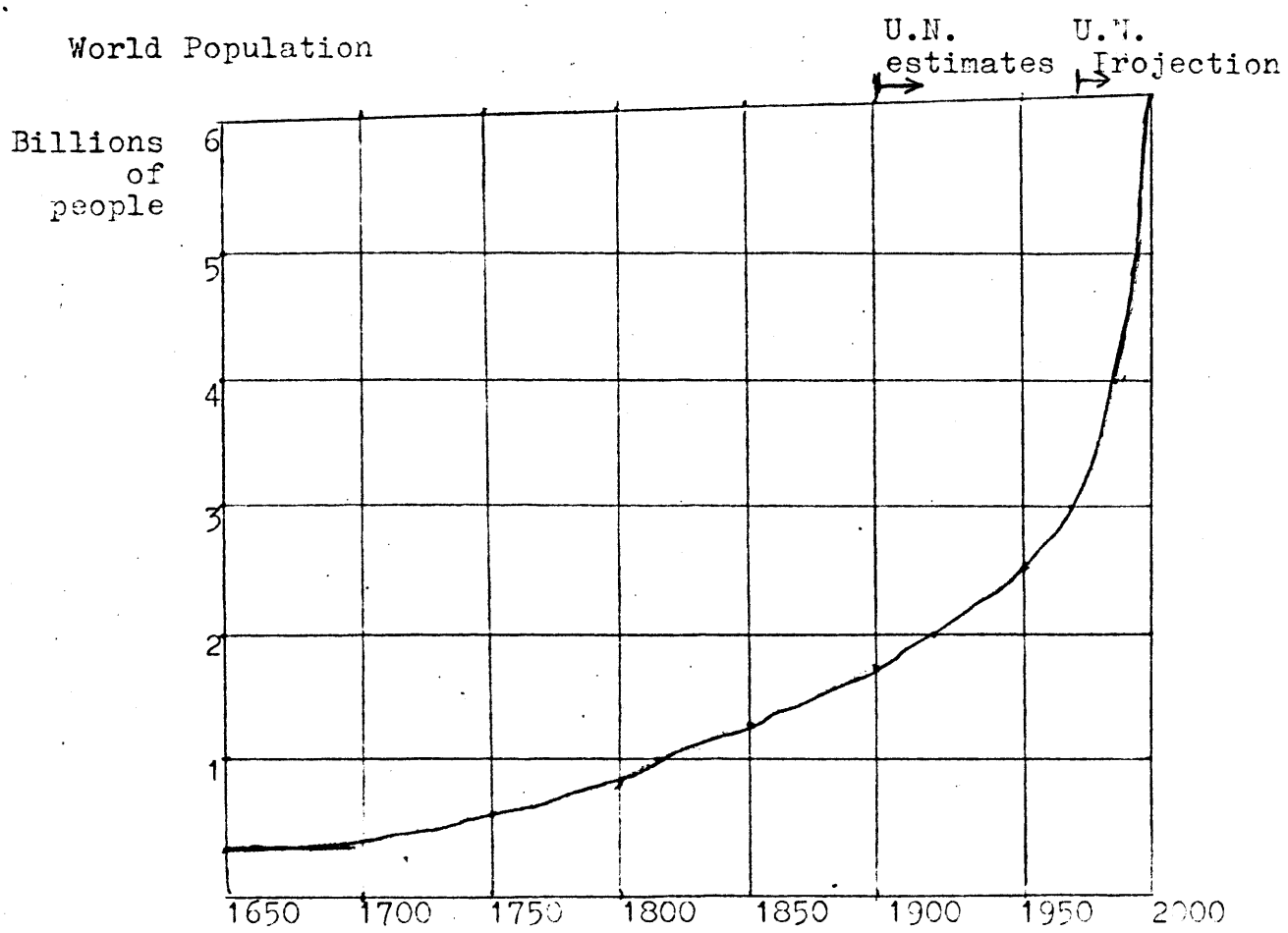
Note: Time taken for 1st billion is put at 4.5 billion years, which is accepted as the approximate age of the earth. We can substitute the number 50,000 years which is the approximate age of our species homo sapiens without changing the dramatic impact of the figures.

in terms of billions of people and the number of years it took to produce each. It is evident that if present trends were to continue, it would not be long before we were faced with the awesome task of preparing for the arrival of an additional billion people in the space of one year!

The kind of growth which Figure 1 depicts is exponential growth. Figure 2 shows the exponential growth curve of world population. In 1650 the population was 0.5 billion and was growing at a rate of 0.3% per year. In 1970 there were 3.6 billion people, and the rate of growth had increased to 2.1%. From this we see that not only is the population growing exponentially, but the rate of growth has been growing also.

The size of the population, at any given time, is determined by the birth rate and the death rate. In a population with constant fertility (the fertility rate is defined as the number of births per 1000 people), the larger a population, the more babies are born. This, obviously, makes a larger population. After a delay to allow these babies to reach child-bearing age, even more babies will be born, swelling the population even more. If there were no deaths in such a population, it would increase exponentially. The number of deaths each year is equal to the total population times the average mortality. If, for instance, a population has a constant mortality rate (i.e. x percent die each year), then each year fewer people will die, because there are fewer people in the population. Assuming no births,

FIGURE 2.



Source: Limits to Growth, Meadows, et. al.

the population would decline to zero. The behavior of real populations is quite complex, though, because they experience varying fertility and mortality rates as well as both births and deaths.

It now becomes easy to understand the recent "super"-exponential rise in world population. Before the industrial revolution, both fertility and mortality were high. The birth rate generally exceeded the death rate, but only slightly. This produced an exponential increase in population, but at a slow rate. But with the advent of modern medicine, better public health techniques, and great agricultural advances, the death rate dropped considerably. So, while fertility has decreased slightly, mortality has diminished even more, resulting in a sky-rocketing population increase.(Fig.2)

The New York Times reported, in April, 1974, that birth and fertility rates in the United States had dropped to their lowest points in history in 1973. This decline was interesting because people were expecting quite the opposite - something that might be called an "echo-boom." As potential parents who were born during the post-war baby boom came of age, it was anticipated that birthrates would rise accordingly, producing a kind of "echo" of the original increase. Instead, however, general fertility is down, offsetting the increase in the number of people entering child-bearing years.

The Population Commission proposes two factors which would explain this decline in fertility. First, many young people today are postponing their time of childbearing;

they will have children at a later age. This effect, of course, is temporary because when the desired age of child-bearing is reached, babies will be produced.[4]

The second factor is that today's younger generation expect to have fewer children in their completed families. A 1971 Census Bureau Survey shows that married women, aged 18 to 24 expect to have, on the average, only 2.4 children. Experience with surveys of this type, however, show that young women tend to underestimate the number of children they will have.[5]

Since the proposed factors explaining the fertility decline are not conclusive evidence that such trends will continue, there is no reason to believe that the United States' period of population growth is coming to an end. In fact, Kingsley Davis, in Population Policy: Will Current Programs Succeed? says: "There is no reason to expect that the millions of decisions about family size made by couples in their own interest will automatically control population for the benefit of society. On the contrary, there are good reasons to think they will not do so."[6] Population growth in the United States has developed a great momentum. Even if immigration ceased, and couples had, on the average, only two children (necessary just to replace themselves), the population would continue to grow for at least another seventy years. With immigration remaining at its present level, a "two-child family" (remember, this is an average) would produce an additional 65 million people by the end of

this century, for a total of 271 million Americans. In order to achieve an immediate halt in population growth, the birthrate would have to drop by about 50%. This would mean that young couples would have to average only one child per family - something that is very unlikely.

We have seen that the "tendency", which Malthus mentions, of population to grow is quite a natural force - a foundation of the evolutionary process. Benjamin Franklin, in Essay on the Increase of Mankind (1751) argued:

> There is, in short, no bound to the prolific nature of plants or animals, but what is made by their crowding and interfering with each other's means of subsistence. Was the face of the earth vacant of other plants, it might be gradually sowed and overspread with one kind only, as, for instance, with fennel; and were it empty of other inhabitants, it might in a few ages be replenished with one nation only, as, for instance with Englishmen.[7]

Malthus, however, does recognize certain checks to mankinds's increase, for "reason" will cause man to ask himself whether he will be able to provide the means of subsistence for those he brings into the world. But, if society's system of social control were to collapse, allowing free rein to the "natural tendency" of growth, we can see from our preceding discussion about the exponential nature of population increase that the consequences would be horrifying.

As Desmond Morris puts it:

> Thanks to medical science, ... we have reached an incredible peak of breeding success. We have practised death control and now we must balance it with birth control. It looks very much as though... we are going to have to change our sexual ways at least ... Not because they have failed, but because they have succeeded too well.[8]

What Will Stop Us?

Many people take the attitude "Why must we worry about population growth? Sure, we have more and more people every year, but science and technology are advancing. They have always provided the solutions to our problems before; there is no reason to believe they will fail us now. Science will find a way to sustain our growing population." There is, however, a problem with that view. We live in a world which is finite. For instance, there is a limit to how much space there is, there is a limit to how much pollution can be absorbed by the atmosphere before it will affect us, and there is a limit to our reserves of non-renewable natural resources.

No one, in the times of Franklin or Malthus, thought it possible for man to actually "use up" the earth, but we of the twentieth century must face the fact that at least some of the limits to growth on earth are being approached. A research team at M.I.T. headed by Dennis Meadows, in conjunction with The Club of Rome, conducted a study of the nature of these bounds. Their controversial findings are reported in The Limits to Growth.[9]

The Limits to Growth examines the physical necessities "that support all physiological and industrial activity - food, raw materials, fossil and nuclear fuels, and the ecological systems of the planet which absorb wastes and recycle important basic chemical substances."[10] Through

use of a much criticized "world-model", they posit that if present growth and usage trends are continued, one or more of these "necessities" will vanish well before the year 2100. We do not really need a computer model to tell us, however, that food shortages and lack of certain resources already exist. While Meadow's model is not perfect, it can be helpful in understanding the interrelationships of factors which cause such shortages. The great body of litigation which exists concerning environmental issues suggest that there is genuine reason for concern about the survival of our eco-system. (see discussion in Chapter 3)

Whether we are approaching the physical limits to growth or not, it is relatively easy to see the nearing social limits. Many of our urban problems (e.g. crime, poverty, traffic) can be traced to population size and density. Figure 3 shows the Federal Bureau of Investigation's statistics on the relationship between urban crime rates and size increase. In addition to crime we are forced to submit to invasions of our privacy, many of us having to live in overcrowded conditions not conducive to good physical or mental health. We can very rarely drive from one point to another without experiencing some kind of traffic tie-ups, and it is becoming increasingly difficult to even walk through the city without being jostled by the crowd. Says Jack Parsons in Population vs. Liberty: "The existance we must begin to picture in our mind's eye (if population growth continues) is life in a society which is, psychologically

FIGURE 3

Increase in crime rates with increase in size: Urban crime rates per 100,000 population 1957

		Size of cities		
		over 250,000	50,000 to 100,000	under 10,000
criminal homicide	murder, non-negligent manslaughter	5.5	4.2	2.7
criminal homicide	manslaughter by negligence	4.4	3.7	1.3
rape		23.7	9.3	7.0
aggravated assault		130.8	78.5	34.0
robbery		108.0	36.9	16.4
burglary, breaking or entering		574.9	474.6	313.3
larceny-theft		1,256.0	1,442.4	992.1
auto-theft		337.0	226.9	112.9

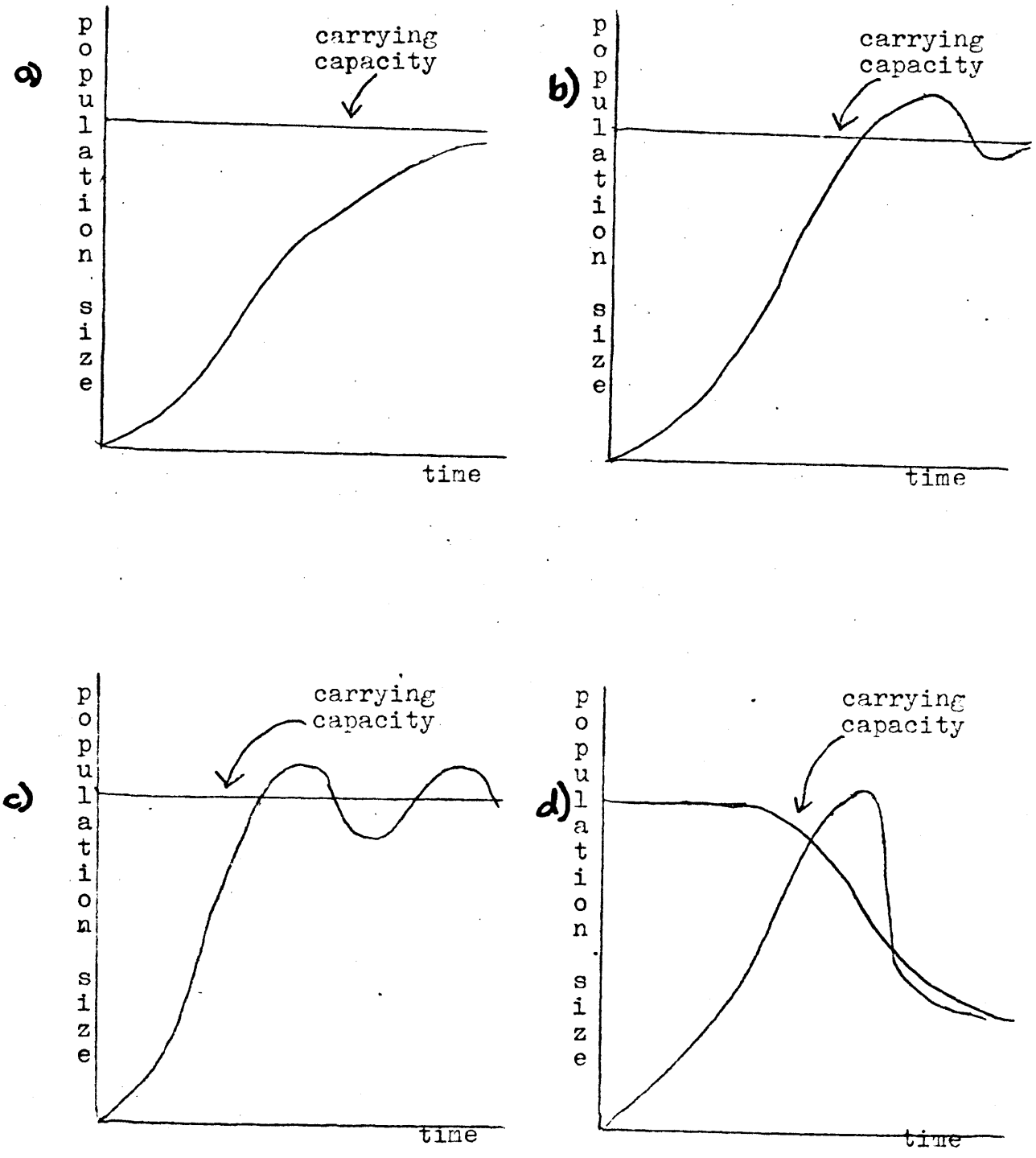
Adapted from F.B.I. Uniform Crime Reports, Annual Bulletin (1957) (Washington, D.C.:U.S. Government Printing Office 1958) p.92

speaking, one long strap-hang in a rush hour tube train."

We find ourselves bounded, then, by two sets of limits: physical and social. There are a number of ways in which these limits can be reached. Figure 4 illustrates the "ultimate carrying capacity" (be it determined by physical or social limits, or a combination) can be approached by a growing population. The population can (a) adjust its growth to equilibrium just below the capacity, (b) overshoot the capacity and die back in a smooth or (c) occillatory way. Or (d) it can overshoot the limit and in doing so decrease the carrying capacity (by consuming certain non-renewable resources). Any option in which the decrease in population growth is precipitated by having crossed the carrying capacity of the system (b,c, or d) is clearly hazardous. Such decrease in growth would necessarily be brutal, being brought about by famine, drought and other shortages. Obviously, option (a), that of adjusting our growth <u>below</u> the limit is the most desirable.

We may already be too late. The limits to growth may have been passed already, and we are just now beginning to experience the consequences (Figure 4 b, c, d). Even if we haven't reached those limits yet, it may be too late to avoid them. We have seen that U.S. families reproducing merely at the replacement level (average of two children) would give us still another 65 million Americans before growth stopped!

FIGURE 4.


a)
population size
carrying capacity
time
b)
population size
carrying capacity
time
c)
population size
carrying capacity
time
d)
population size
carrying capacity
time

No one knows which mode of behavior our world population is following. The question is: Can we afford to wait and see? The world will not benefit from more people straining its limits. Nor will the United States profit from additional growth. The Population Commission found that:

> no substantial benefits would result from continued growth of the nation's population ... We further concluded that the stabilization of our population would contribute significantly to the nation's ability to solve its problems ... Stabilization would "buy time" by slowing the pace at which growth-related problems accumulate and enhancing opportunities for the orderly and democratic working out of solutions.[12]

Americans, then, have nothing to lose and everything to gain by adopting a program directed towards halting population growth.

How Can We Stop?

Basically, there are two ways in which to stop the increase in a population. Since population size is determined by the difference between the birth rate and the death rate, a stable population can be reached by controlling either the birth rate or the death rate.[13] Medicine and technology have succeeded in lowering the death rate considerably since the Industrial Revolution - and there is no reason to believe that anyone would want (or allow) this to change. The solution, then, is necessarily to reduce the birth rate. Since we have seen that there is no reason to believe that this will happen on its own (indeed the opposite seems likely), and since immediate action is essantial

the government must take the initiative.

Any government action in realm of population control is bound to cause dispute because of the necessary interference with the right of privacy in sexual relations. All governmental attempts so far to legislate in any related matters - abortions, contraceptives, sterilization - have been met with public controversy.[14] Most people appear to regard the right of procreation as absolute. The government, they seem to feel, has no right to delve into the private world of sexual relationships of married couples. That would be totally unacceptable, given the framework of our society, for it is our right to reproduce as we wish.

In a society such as ours, we must concern ourselves with two aspects of the problem of mandatory population control. Is it legal? (i.e. does our legal system provide a mechanism by which it can be instituted?) Is it justifiable? (i.e. is the idea obnoxious to our concept of liberty?) We return, then, to the question alluded to in the opening paragraphs: Are there legal ways by which a mandate limiting population can be reconciled within a framework of freedom?

NOTES

1. U.S. Commission on Population Growth and the American Future (U.S. Government Pringing Office 1972)

2. Malthus, T.R., Essays on Population (1798) (MacMillian Co., Ltd.)

3. Morris, Desmond, The Naked Ape (McGraw-Hill Book Co. 1967) p. 66

4. U.S. Commission On Population Growth, supra, p.

5. Id.

6. Davis, Kingsley; "Population Policy: Will Current Programs Succeed?" Science, 158, November 10, 1967, p. 731.

7. Franklin, Benjamin; "Essay on the Increase of Mankind" (1751)

8. Morris, supra, pp 101 - 102

9. Meadow, Dennis, et al.; The Limits to Growth (Universe Books, 1972)

10. Meadows, supra p.

11. Parsons, Jack; Population vs. Liberty (Pemberton Books, 1971)

12. U.S. Commission on Population Growth, supra, Letter of Transmittal.

13. Picture a kitchen sink in which the flow of incoming water can be controlled by use of a faucet, and the flow of the outgoing water can be controlled by use of a valve on the drain. The amount of water in the sink would represent the population size, the rate of flow at the faucet, the birth rate, and the rate of flow at the drain, the death rate. To keep the water at the same level, it must be draining and filling at the same rate.

14. Most of these attempts have been policies which would tend to increase population, but the arguments against governmental action and for personal privacy are just as strong when applied otherwise.

CHAPTER TWO. FREEDOM, LIBERTY AND RIGHTS

Compulsory population control involves interference with a personal right: the right to reproduce. When we say we have a right to do something, we mean we are free to do this thing at our will; we are at liberty, because no one has the authority to force us to refrain from this action.[1] Most people can agree on the desirability of freedom, but there is usually a great amount of misunderstanding about just what it means to "be free." A popular concept of liberty, which Parsons calls the "commonsense approach,"[2] states that if society (usually in the form of the policeman) is not actually stopping one's car in the street, taking one away in handcuffs, or carrying out some other official activity that is an obvious limitation on one's liberty then that society is "free."

The commonsense approach to liberty is, of course, not realistic. Our freedom of behavior is drastically reduced by a myriad of rules and regulations. When we add to these constraints on individual liberty those informal restrictions which are more or less binding through public opinion, we find that in a modern society, very little liberty actually exists.

Another notion of liberty is one that sees the absence of all controls on behavior whatever. The Shorter Oxford Dictionary defines "liberty," in part, as "Faculty or power

to do as one likes ... Free opportunity or scope to do something ... Unrestrained action, conduct or expression, license, etc".[3] Such a total lack of restrictions would be a state of anarchy. Aristotle saw that such a state would actually reduce individual liberty: "Justice is believed to consist ... (of) liberty in doing exactly what one likes. In extreme democracies, therefore, everyone lives as he pleases ... But this is an altogether unsatisfactory conception of liberty. It is quite wrong to imagine that life subject to constitutional control is mere slavery; it is in fact salvation."[4]

Hence, we see that while arbitrary restrictions on behavior reduce our freedom, some form of "social control" is needed to insure individual liberty. Emile Durkheim, in The Division of Labour in Society argued: "... If all authority ... is wanting, the law of the strongest prevails and latent or active, the state of war is necessarily chronic.

That such anarchy is an unhealthy phenomenon is quite evident, since it runs counter to the aim of society, which is to suppress ... war among men, subordinating the law of the strongest to a higher law. To justify this chaotic state we vainly praise its encouragement of individual liberty. Quite on the contrary, liberty ... is itself the product of regulation. I can be free only to the extent that others are forbidden to profit from their ... superiority to the detriment of my liberty. But only social rules can prevent abuses of power ...[5]

Maurice Cranston has made an observation which may help us explain much of the confusion about the concept of liberty. Says he: "... while the descriptive meaning of 'liberty' ... varies, the emotive meaning tends ... to be constant."[6] We find that as the needs of society change, we are forced to accept a constantly varying "descriptive" definition of liberty (in the form of new "social rules"), while we maintain that "emotional" feeling for freedom which we hold. The addition of new social controls, in order to be accepted, must not require behavior which differs too much from that already allowed within the present descriptive content of "freedom." If it does not - that is, if the content of "liberty" does not change too drastically, then these new controls become incorporated into the new definition of freedom. These two ideas (descriptive and emotive) are quite distinct. If you were to ask someone who says "We live in a free society" what that means, the reply would more than likely be "It means I can do anything I want to." But examine all the constraints on behavior necessary for that society to function, and you will see this is not so.

We see, therefore, that in order for a control to be acknowledged as legitimate, this question must be answered: Does this ask of me anything radically different from what has heretofore been required of me? (i.e. does it change the descriptive definition of freedom much?) If not, then I can adopt it as part of my behavior and still

subscribe to that emotive definition of liberty which I hold so dear (and still say "I am free to do as I wish").

To determine the propriety of population control, then, we must concern ourselves not with this emotive concept of liberty - which is, in society actually nothing more than an illusion - but with the descriptive connotation of the word "freedom."

Liberty In Society

Henry David Thoreau, in his essay Civil Disobedience, tells us: "That government is best which governs least."[7] He extended this reasoning and concluded that that government which governs not at all would be ideal. While we have seen that this is not the case, that some government is necessary, we can still accept Thoreau's first premise: "least is best." It is this question of "How much is too much?" which has thwarted philosophers and political scientists in their attempts to describe a truly free society.

American thought on this subject finds some of its origins with John Locke. His Second Treatise on Civil Government[8] contains many of the ideas concerning liberty which are later found in the Declaration of Independence. The Treatise begins with a description of a "State of perfect Freedom", which all men are naturally in, and in which all are free "within the bounds of the Law of Nature" to do as they wish.[9] This Law of Nature, says he, is Reason,

which teaches that , everyone being equal, "... no one ought to harm another in his Life, Health, Liberty or Possessions."[10] The enforcement of the Law of Nature will prove to be difficult because "... it is unreasonable for Men to be Judges in their own cases ..." [11] So, to provide the control necessary to enforce the Law of Nature, "... Civil Government is the proper Remedy for the Inconveniences of the State of Nature ..."[12]

For summary Locke Says:

> The Natural Liberty of Man is to be free from any Superior Power on Earth, and not to be under the Will ... of Man, but to have only the Law of Nature for his Rule. The Liberty of Man in Society, is to be under no other Legislative Power, but that established, by consent ... nor under the ... Restraint of any Law, but what the Legislative shall enact, according to the Trust put in it. Freedom then is not what Sir R.F. (Robert Filmer) tells us ... A Liberty for everyone to do what he lists ... and not to be tyed by any Laws: But Freedom of Men under Government, is, to have a standing Rule to live by, common to every one of that Society and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the ... Arbitrary Will of another Man ...
> ... where there is no Law, there is no Freedom.[13]

The United States has never been, nor has the claim in a state of "Natural Liberty" (i.e. under no restraint but the Law of Nature). The Continental Congress, in the Declaration of Independence recognized, "... that to secure these rights (Life, Liberty and the Pursuit of Happiness, and other unalienable rights), Governments are instituted among men ..."[14] to make social rules. In fact, one of the stated reasons which impelled them to dissolve the ties with England was that they were being denied certain laws which were necessary to ensure individual liberty: The King

"... has refused his Assent to Laws, the most wholesome and necessary for the public good."[15] Eleven years later, in 1787, Congress established a Constitution "... in order to... establish justice ... and secure the blessings of liberty to ourselves and our posterity .. "[16] A government had been formed and given the power to make rules, in the form of laws, which would not enslave its citizens, but make them free.

The power of the government to control, however, is not absolute. Questioned Cicero: "And I ask you, if the people had commanded that I should be your slave, or you mine, would that be validly enacted, fixed, established?"[17] There is, then, some boundary beyond which even the will of the people cannot transgress; there is a sphere of activity which remains immune from public control.

There is much to be debated about the limits to the authority of society over the individual; it involves complex moral issues concerning not only society's responsibilities to the individual, but also a citizen's responsibilities to the commonwealth. However, if we look closely at the stated reasons for the institution of governments, we will see that the limits to authority are implied therein.

Consistently, we have seen government viewed as a shield - that which protects the individual from actions of others, where these actions might make it difficult for him to exercise his rights. From this viewpoint, it would seem logical that any actions which do not impair the

ability of others to carry out their will should be beyond the control of society. Everyone is free to do as he wills, provided he does not infringe the freedom of anyone else. "Whenever, in short, there is a definite damage ... either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of ... law."[18] Anything which affects only the individual actor, or others by choice, is not within the realm of societal control.

The Changing Needs Of Society: 'Descriptive' Liberty Varies

We spoke earlier of the varying descriptive content of liberty. This was brought about, we said, by the changing needs of society. Let us examine what is meant by this.

The simplest illustration of how the necessity for new controls can be brought about by change is one where technological advances make possible activities which did not exist before. Prior to the invention of the automobile, it would have been absurd and impossible to think of automobile traffic laws. With the advent of the motorcar, it became apparent that in order to protect pedestrians and horse riders, and to allow drivers the full enjoyment of their cars, certain regulations concerning the use of this new instrument were necessary. For example, in New York, when driving through town it was required to have a person running well ahead of the auto, to warn people of its approach! This law did not change the descriptive content of people's liberty too much. In the past, before the car, most people

were naturally courteous and careful when using other modes of transportation. This new necessity (that of a runner), brought about by a technological advance (i.e. cars), was a "logical" extension of previous behavior requirements, and therefore acceptable. Obviously, behavior had become restricted - one could not drive through town without a runner - but people were still able to comfortably say "I am free to travel (drive) as I wish." We know, of course, that the sentence should end with "... provided I obey the law."

Radio and television provide us with another example. Before radio or TV was invented, no one even knew that broadcast frequencies existed. Now, there is a huge federal agency which deals with the regulation of their use.

The change in the content of liberty can be brought about by social,as well as technological, advances. With the passage of the Thirteenth Amendment, people were no longer allowed to own slaves. This was the product of a slow social process in which people's values and morals were re-examined and changed. The issue, of course, was controversial, but on the whole it reflected the realization that slaves were human beings and not property. Hence, there were more restrictions on behavior (people could not own slaves), but one was still "free" to dispose of his property as he saw fit.

Now, in addition to technological and social considerations, ecological needs are also bringing about changes in our content of liberty. Congress recently enacted a bill

regulating strip-mining practices, thereby recognizing that a continuation of present mining activities would mean certain ecological disaster. When reserves of coal were considered "unlimited", and mining could not possibly damage the eco-system, companies were free to mine as they wished. Now, on the brink of disaster, practices must change.

Population And The Changing Needs Of Society

All of the above examples concern activities whose public nature is relatively easy to understand. It is not hard to see that automobiles can be dangerous, and therefore must be controlled; it is also obvious that the keeping of slaves - the denial of basic rights to a whole class of people - is of great public import. (It should be realized that a little over a century ago this was not obvious.) But population control involves meddling in a very private sphere of activity. Have the needs of society changed so, so that a matter as personal as sexual relationships is of public concern? Dr. Heenan, Archbishop of Westminster asked: "If a man and woman decide to have ten children what business can it possibly be of yours or anyone else's?"[19] Concerning this query demographer Lincoln Day says that while "reproduction is a private act ... it is not a private affair, it has far-reaching social consequences."[20]

Mill, in his Essay on Liberty spoke of this distinction between actions which in themselves are private (involving

the invidual only), and their social consequences:

> If, for example, a man, through intemperance or extravagance, becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated, and might be justly punished; but it is for the breach of duty to his family or creditors, not for the extravagance. If the resources which ought to have been devoted to them had been diverted from them for the most prudent investment the moral culpability would have been the same. George Barnwell murdered his uncle to get money for his mistress, but if he had done it to set himself up in business, he would equally have been hanged ... In like manner, when a person disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public he is guilty of a social offense. No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty.[21]

According to Mill, then, actions which are strictly private, per se, can be "... taken out of the province of liberty, and placed in that of ... law"[22] not because of the act itself, but because of its consequences; and it would not matter if the original act, in and of itself were laudable.

In Chapter one we discussed reasons why the explosion in population growth is cause for concern. We have seen the social consequences [23] of an uncontrolled increase in population size. At the root of these problems are sexual relationships (which cause population growth), which are private, per se, and definitely not inherently reprehensible. It is the consequences, which are now critical because of the changing nature of society, and not the private act of procreation itself. That placed the matter "in the province

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of law" and should allow us to add new social controls of our liberty. Even al long ago as 1858, Mill saw justification for population control:

> The fact ... of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility - to bestow a life which may be either a curse or a blessing - unless the being on whom it is bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being. And in a country either over-peopled or threatened with being so to produce children, beyond a very small number, with the effect of reducing the reward of labor by their competition, is a serious offense against all who live by the renumeration of their labor. The laws which, in many countries on the Continent, forbid marriage unless the parties can show that they have the means of supporting a family, do not exceed the legitimate powers of the state: and whether such laws be expedient or not (a question mainly dependent on **local** circumstances ...) they are not objectionable as violations of liberty. Yet the current ideas of liberty, which bend so easily to real infringements of the freedom of the individual, ... would repel the attempt to put our restraint upon his inclinations when the consequence of the indulgence is a life or lives of wretchedness... to the offspring, with manifold evils to those sufficiently within reach to be in any way affected by their actions. 24

Couples reproducing indiscriminately in countries which are over-crowded will ultimately interfere with the rights of both those produced and those already existing in society; the act of reproduction can therefore be controlled.

The Legal Concept of Nuisance

There exists, in law, a concept which helps protect the rights of property owners from infringement by others: the law of nuisance. While it is not suggested that new-born

babies can actually be classified as "nuisances", a discussion of this legal concept may be helpful in illustrating the ways in which it might be said that uncontrolled population growth interferes with the rights of others.

Black's Law Dictionary defines "nuisance" as:

> That which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him ... Everything that endangers life or health, gives offense to senses, violates the laws of decency, or obstructs reasonable and comfortable use of property ... or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake or river, ... or any public park ... [25]

Nuisances are usually classified as public, private, or mixed. A public nuisance is one which affects an indefinite number of people, or the public in general. A private nuisance affects one or a small group of property owners in a way different from its impact on the general public. Since it is often difficult to draw the line between a public and a private nuisance - many nuisances affect the general public as well as the private rights of a particular property owner - some circumstances fall into the mixed nuisance category. There is no hard and fast rule which determines what constitutes a nuisance - that is, what use injures the property of others, and at what point does that use become unreasonable. Each case tends to be unique and it turns out that a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[26] The law makes a distinction between acts, occupations, or structures which are nuisances

at all times (nuisance per se) and those which become nuisances by reason of circumstances and surroundings (nuisance per accidens). "... Whether a thing not a nuisance per se is a nuisance per accidens ... depends upon its location and surroundings ... or other circumstances ..."[27] It is not necessary that the act creating the nuisance be, in itself, illegal, for a "... lawful business may be conducted in such a way as to amount to a nuisance, either because of its location or because of the effect of the operation."[28]

For many years, those who are concerned with the cleanliness of our environment have sought to use the law of nuisance to eliminate certain causes of pollution. The emission of smoke and dust which menaces the health of the public[29] or interferes with the quiet enjoyment of one's property[30] can be declared a public nuisance. There must, however, be more than a mere inconvenience; for smoke to be a nuisance, there must be a perceptible injury.[31] This does not mean that impairment of health must be shown, for in some cases serious discomfort and annoyance may constitute a nuisance.[32]

The declaration of something as constituting a nuisance depends upon, as we noticed above, "unreasonable" use of one's property. In order to determine "reasonableness" the courts usually resort to a practice commonly known as "balancing the equities" (the plaintiff's right to enjoy his property versus the defendant's same right with respect to his property).

> ... We live in a business culture. It is a culture that has shaped our values to meet the needs of an industrial system. The effect of this background of values is evidenced in the development of nuisance law. In nuisance law the equities of the situation were balanced. This meant that the reasonableness of the defendant's actions was the prime factor to be considered in this balancing process. This reasonableness of use depended upon an idea of progress, and by tending to resolve the question in terms of industrial development limited the effectiveness of the nuisance doctrine in protecting the environment."[33] (citations omitted)

Thus, in Madison v. Ducktown Sulphur, Copper & Iron Co. Ltd.,[4] although the court recognized that pollution destroyed the complainants' crops, it refused to grant injunctive relief because it would "blot out two great mining ... enterprises, destroy half the taxable values of a county, and drive more than 10,000 people from their homes."[35] The court did not, however, in balancing the equities "consider possible harm from the air pollution in question to thousands and even millions of citizens other than the immediate complainants... "[36]

The difficulty in proving the required damages gave rise to two developments: courts simply began to find damage to the public by taking "judicial notice" that impure air was harmful, and legislatures declared dense smoke to be a nuisance per se. But for the most part one single identifiable source of pollution can be found, because increased levels of pollution are caused by thousands of installations and automobiles. So, the law of nuisance, as it stands, is relatively ineffective against pollution.

The late Chief Judge Vanderbilt of New Jersey saw

justification, then, for legislation which would protect the environment:

> the reason for a municipality making unlawful the emission of smoke is readily apparent. The issuance of dense smoke from a single chimney, is and of itself, may be altogether harmless and cause no ... damage to the public, but if smoke of like density issued from hundreds of chimneys, the contamination of the atmosphere would be substantial and the injury to the public considerable, yet for the lack of the requisite elements of a public nuisance at common law, the municipality could obtain no relief by way of indictment. Ordinances making unlawful the emission of smoke are therefore obviously necessary and reasonable and a valid exercise of the local police power.[37]

We see, then, that certain concepts contained in the laws of nuisance can be adapted to use against pollution. While the common law of nuisance, itself, has been ineffective in controlling the problem, the courts and legislatures have taken cues from the ideas, and are slowly moving recognizing the dangers to our environment.

Babies As Nuisances

If we examine the population problem in the context of the discussion about nuisance and related law, we will see that although it cannot be asserted that those who reproduce indiscriminately are creating a nuisance, and therefore can be stopped, the idea of controlling and in some cases halting, a lawful activity is not foreign to our concept of liberty. We have seen that those who are responsible for conduct, legal or illegal, which because of certain circumstances causes damage to another party, can be required to cease such activity. Procreation is, of course,

a right. The activity which brings it about is unquestionably lawful. In "balancing the equities," in the context of today's situation however, is careless reproduction reasonable? We can no longer make the mistake that the Ducktown court made when it refused to see the immense existing and potential harm if this "nuisance" is allowed to continue.

Whose Responsibility?

It is often hard for people to understand just who is responsible for the population boom. A family in the United States producing thirty children in 1970 would have increased the population of the country by approximately 0.000000015 percent - that is, just slightly more than one ten-millionth of one percent. It is no wonder that parents see their own responsibility in producing an "explosion" as very small.

Unfortunately, all individual members of all populations are produced by individual couples. No matter how large the population, it is all brought about by infinitesimal increments.

Parsons relates a scenario, simple and somewhat absurd, which will help understand where the responsibility lies. Because it describes the problem so well, it is quoted in full:

> If, instead of what is actually happening, all the three billion or more surplus infants expected by the year 2000 were being produced by a small and clearly

> identifiable - not to say miraculously fertile - group the citizens of Fertilia* say, possibly on another planet, whose friendly and cooperative progeny overflowed throughout the world so that the result at the receiving end was exactly the same as if the surplus had continued being produced locally, somewhat different attitudes could be expected. In otherwise stationary populations, all the new competition for space, food, shelter, raw materials, working capital, education, recreation, transport, and the rest would be identifiable as members of an outgroup, Fertilia, and all the pent-up frustration we now feel at the constantly increasing pressure of numbers would almost undoubtedly be directed against them.
>
> If the skins of Fertilians happened to be a different color the outcome could be cataclysmic but even without this element the situation would be explosive enough and a powerful reaction would be generated against the pathologically fertile source of the pressure. Sanctions sufficient to cure the problem, whatever they entailed, would almost certainly be forthcoming - even annihilation of Fertilia - and the world would heave a sigh of relief when the pressure was turned off, even if the price were some twinges of conscience.
>
> At the moment we have no social mechanism, legal or otherwise, or much of a philosophy, for focusing our feelings on the source of so many of our problems and furstrations because population pressure is not generated by the carefree copulations of the Fertilians but by our own mums and dads, friends and neighbors, or - worst of all - by us in person. We cannot direct our frustrated aggression at these targets so the fuse must fizz on until something which <u>can</u> explode is reached, <u>but however reluctant we may be to recognize responsibility in this sphere the law has set us clear precedents in others</u>.[38] (* citation omitted.)

In the past we have acted to control the causes of danger to our society, even when our instinct told us that those responsible had a "right" to act as they did. We would change our description of liberty slightly to fit the demands of the situation, and still satisfy our need to be free. The control of reckless population growth is no different.

NOTES

1. Throughout this chapter, "freedom" and "liberty" will be used interchangeably.

2. Parsons, supra, p.

3. The Shorter Oxford Dictionary

4. Aristotle, Politics, Book 5, Everyman's edition, p. 156

5. Durkheim, Emile; "The Division of Labour in Society" quoted in Parsons, supra, pp. 77-78 (emphasis added)

6. Cranston, Maurice "Freedom, A New Analysis" (Pemberton Publishing Co. 1953) p. 21 (emphasis added)

7. Thoreau, Henry D.; "Civil Disobedience"; Walden and Other Writings, Atkinson, ed. (Random House 1937) p. 635

8. Locke, John: "Second Treatise on Civil Government", Two Treatises of Government (Mentor 1965)

9. Locke, supra, paragraph 4

10. Id. paragraph 6

11. Id. paragraph 13

12. Id.

13. Id. paragraphs 22 and 57 (emphasis original)

14. Declaration of Independence

15. Id.

16. United States Constitution, Preamble

17. Cicero, quoted in Corwin, Edward S., The Higher Law Background of American Constitutional Law (Cornell Univeristy Press 1971) p. 13

18. Mill, John Stuart; Essay on Liberty " Harvard Classics 25, Eliot, c.w., ed. (P.F. Collier & Son 1937) p. 277

19. Heenan, quoted in Parosns, supra p. 137

20. Day, Lincoln, quoted in I Environmental Law Revie 48

21. Mill, supra pp. 276-277 (emphasis added)

22. Id. p. 277. see text supra accompanying n. 18

23. "Social" in this context means all effects on society, physical and more restricted use of the term social.

24. Mill, supra, p. 305

25. Black's Law Dictionary

26, Village of Euclid v. Ambler Realty Co. 272 U.S. 365 at 388 (1926)

27. Borgnemouth Realty Co. Ltd. v. Gulf Soap Corp. 212 La. 57

28. Sohn v. Jensen 11 Wis 2d 449

29. Penn-Dixie Cement Corp. v. Kingsport 225 sw2d 270 (1949)

30. Hofstetter v. George M. Myers Inc. 228 p 2d 522 (1951)

31. Tuebner v. California St. R.R. Co. 4 p. 1162 (1884)

32. Judson v. Los Angeles Suburban Gas Co. 106 p. 581 (1910)

33. 3 Environmental Law Review 144 (citations omitted)

34. Madison v. Ducktown Sulphur, Copper & Iron Co. Ltd. 83 S.W. 658 (1904)

35. Id. at 666

36. Juergensmeyer, quoted in 1 Environmental Law Review 216

37. Board of Health v. New York Central Railroad 90 A. 2d 729,735 (1952) (emphasis added)

38. Parsons supra pp. 151-152 (citations omitted; emphasis added)

CHAPTER THREE. CONSTITUTIONAL IMPLICATIONS

The preceding chapters have attempted to establish the existence of a problem of excessive population growth, and the moral justification for its mandatory control. This chapter will examine the legal implications of such a policy. It is beyond the scope of this paper to propose a specific population policy, but two assumptions about this policy will be made: uniformity in approach being essential, the policy must be federal rather than state-wide, and the policy will somehow place compulsory control on what is referred to as the right to procreation.

Any exercise of federal power must be based on a constitutional authorization. This criterion is present for all constitutional matters, for the national government has only those powers which are specifically granted to it or which may be implied from one or more of its delegated powers.[1] The fact that a problem may be national in nature does not automatically give the federal government power to act.[2]

If an action of the government is challenged as unconstitutional, it is the Supreme Court that decides whether the Constitution can be interpreted in a way which allows such acts. The fact that a policy might be normally justified is not enough to make it constitutional. Justification must be found in the Constitution, explicitly or implicitly. We shall examine whether, given the present

ideas concerning our environment, and man's responsibility to it and to fellow man, the Supreme Court could accept as constitutional a national policy of mandatory population control. If such a policy is not permissible, what developments in our system of law are necessary so that something which is both moral and essential would be also legal?

Ordinary Powers

Population policy is not mentioned anywhere in the Constitution. This, however, does not necessarily mean that the government is forbidden to delve into such matters; as noted above Congress can assume powers which can be implied from other specific powers. For example, in Perez v. United States[3] the Consumer Credit Protection Act was upheld against the claim that the commerce clause (Congress shall have power to ... regulate commerce ... among the several States.) did not give Congress the power to control the purely local activity of loan sharking. The Court there stated that "activities affecting commerce" are reachable by Congress even "without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce."[4] The power to so regulate was implied in the commerce clause.

Therefore, although we cannot find population control mentioned in the Constitution, we may find justification for congressional action in the spending powers in Article I,

section 8. This gives Congress the power to "lay and collect taxes ... to pay the debts and provide for the ... general welfare of the United States." and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers ..." Supreme Court decisions concerning the spending powers of Congress show that the views of Alexander Hamilton rather then those of James Madison prevail.[5] Hamilton was in favor of allowing federal funds to be used very liberally, their use being limited only by the constitutional provision that the "general welfare" must be enhanced.[6] Using this philosophy, Congress, then, may make population policy as long as its expenditures are not dependent on depriving persons of their constitutional rights. This idea of "unconstitutional conditions" means, for instance, that Congress may not establish a church, or create a familiy which was segregated by race. Article I, section 8 of the Constitution, therefore, may provide a basis for congressional population policy.

Emergency Powers

In addition to ordinary powers, Congress might take on certain special powers during periods of national emergency. We spoke earlier of man's responsibility to his society. Professor Carl J. Friedrich commented on this while speaking of the concept of "constitutional reason of state":

> When there is a clash between the commands of an individual ethic of high normativity and the needs and requirements of organizations whose security

> and survival is a stake ... the issue of reason of state becomes real. For reason of state is nothing but the doctrine that whatever is required to insure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men.[7]

The concept of "reason of state" is not an openly acknowledged principle of constitutional law. In fact, it is used quite rarely - only in times of extreme emergency. There are two Supreme Court cases which adequately illustrate the utility of this doctrine, and its possible use in the field of population policy.

In Korematsu v. United States[8], the Court upheld the forcible exclusion of native-born American citizens of Japanese ancestry from areas of the West Coast during World War II. Korematsu is representative of a series of cases, the Japanese Exclusion Cases, which constitute the largest single mass deprivation of personal liberties in American history. The opinion states:

> We uphold the exclusion order as of the time it was made and when the petitioner violated it ... In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens ... But hardships are a part of war ... All citizens ... feel the impact of war in greater or lesser degree. Citizenship has its responsibilities as well as its privileges, and in time of was the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, <u>except under conditions of direct emergency and peril</u>, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[9]

The Korematsu decision is significant for two reasons. First the Supreme Court accepted the deprivation of rights

to a large class of people on grounds of national security, and second it did so without questioning the judgment of danger by military and political leaders of the government. They did not examine the record to determine whether there had in fact been a danger to the nation. The Court, therefore, did not bar, in times of widely perceived danger (based on fact or not), actions thought to be necessary for the national security.

In another case - Home Building & Loan Association v. Blaisdell[10] - the Supreme Court upheld a Minnesota statute which permitted "mortgage moratoriums" during the economic emergency of the Great Depression. This statute was in direct contravention of the "obligation of contracts" clause in the Constitution (No State shall ... pass any ... law impairing the obligation of contracts ...) There, the Court explained:

> In determing whether the provision for this temporary and conditional relief exceeds the power of the State ... we must consider the relation of emergency to constitutional power ...
>
> Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. It grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency ...[12]
>
> Whatever doubt there may have been that the protective power of the State, its police power, may be exercised - without violating the true intent of the provision of the Federal Constitution - in directly preventing the immediate and literal enforcement of contractual obligations, by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during

a period of scarcity of housing.[13]

The opinion goes on to explain that there is "a growing recognition of public needs and the relation of individual right to public security, (by which) the court has sought to prevent the perversion of the (obligation of contracts) clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests."[14] Chief Justice Hughes finally concluded that the statute merely varied the remedy, not the obligation, of contracts. The Court shows us that the power existed, and the emergency provided the environment in which it could be exercised.

So far population growth has not been deemed ~~an~~ immediate threat to the national security. Whether the idea of "reason of state" could be used in justifying action depends largely on whether some catastrophe due to growth existed. It does not seem likely that such a catastrophe would be acknowledged in the near future, and, as was noted, emergency powers, being by nature contrary to constitutional rule, are used only when in dire need. It would, therefore, not be a sound basis for population policy of the type with which we are concerned - but should conditions change, and disaster of some sort become imminent, there is legal precedent to justify the institution of controls.

Barriers To Action

Having established a constitutional basis for federal intervention we can now examine the factors which must

shape the content of a national population policy. (Note that we have only demonstrated a justification for action, not an explicit description of what a policy may prescribe.)

The right to procreate is intertwined with at least two other important rights - those of marital privacy and of freedom of religion. Any policy which would deprive families of the right to decide when and how often to bear children would interfere with these liberties. The law provides numerous constitutional barriers to the enactment of compulsory population control measures.

The Right To Procreate

Mr. Justice Douglas suggested, in Skinner v. Oklahoma,[15] that the right to procreate is a "natural " one. The opinion, which deals with a case challenging compulsory sterilization for habitual criminals, states:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects ... There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[16]

There does exist, then, a precedent for outlawing compulsory population control measures. The court has considered the right to procreate a basic right; but as we saw in chapter 2, constitutional rights may be balanced against societal interests by the Court.

The Right To Marital Privacy

The right to marital privacy is distinct from that to procreate. Indeed, the recognition of a right to marital privacy could make compulsory controls impossible whether or not the Court found that a right to procreate existed - population control means legislating in an area which is open to only husband and wife.

Griswald v. Connecticut[17] establishes this conjugal privacy. In this case the Court invalidated a Connecticut statute which forbade the use of contraceptives, recognizing that the right of a woman to decide whether or not to have a child is based on a right to privacy in marital relationships. If the state may not invade this privacy to forbid the use of contraceptives, it would follow that the requirement of contraception would infringe this same right. As with the right to procreate, though, an overriding state interest may allow interference.

The Freedom Of Religion

The First Amendment, which guarantees the freedom of religion, may be seen as an obstacle to mandatory regulation. All forms of artificial contraception are forbidden by some religions. Compulsory measures would require, for example, Roman Catholics to act contrary to their religious beliefs. The Supreme Court, in interpreting the First Amendment, has drawn a distinction between belief and conduct, however.

In Cantwell v. Connecticut [18] it was held that "the Amendment embraces two concepts - freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[19] As the right to religious freedom is no different from any other right then: religious conduct may be regulated in the pressence of a valid compelling state interest.

In summary: the Constitution, it appears, would allow mandatory population control measures which restricted fundamental rights, only if an overriding state interest were demonstrated.

How "Compelling" An Interest?

We are now faced with the question of what makes the interest of the state "compelling" enough to justify interference with personal rights. The Supreme Court faced this question in the context of compulsory sterilization in 1927 in Buck v. Bell[20] when it upheld Virginia's eugenic sterilization law.

This statute provided for the sterilization of any inmate of a state institution whenever such action was considered to be in the best interests of the patient and society. Carrie Buck was an eighteen year old girl who was committed to a Virginia home for the feeble-minded. Both her mother and her daughter were feeble-minded.

Before the Supreme Court, it was not argued that the plaintiff had been denied procedural due process; there was a system of notification and hearing provided for in the law which was supposed to ensure the inmates' rights. "The attack is not upon the procedure, but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds."[21] Mr. Justice Holmes then went on to explain that substantive due process was unharmed:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[22]

Buck found that substantive due process was not violated by compulsory sterilization in order to prevent the procreation of defective children. The same argument can be offered to the Court in defense of a program of compulsory population control against charges that it violated substantive due process, i.e. the right to procreate.[23] One of the objections to the Buck decision is the assumption that conditions which the law sought to control were in fact hereditary, even though no scientific basis for such a

belief existed.[24] This line of reasoning could not be used against a population program, for the connection between such a policy and the reduction of population growth is obvious.

The case of Skinner v. Oklahoma, mentioned above, in which the Court overturned a compulsory sterilization law, does not weaken our argument. Unlike Buck, it was not decided upon grounds of substantive due process, but upon that of equal protection. The Court disallowed the sterilization of habitual criminals because of a clause in the Oklahoma statute which exempted from such punishment "persons convicted of offenses rising out of violation of the prohibitory laws. revenue acts, embezzlement or political offenses."[25] Mr. Justice Douglas said that "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[26]

By resting their decision in Skinner on denial of equal protection, the Court did not come to consider the consequences the statute held for substantive due process. The opinion stated that the Court need not delve into the question of what the effect would be if Oklahoma were to remove the offending clause from the statute.[27]

The decision in Buck is informative in determining when the Court considers a government's interest so

compelling that it may interfere with fundamental personal liberties. Justice Holmes showed that because feeble-minded persons' traits were considered hereditary, they were thought to be a danger to society. The state had an overriding interest to limit their rights "in order to prevent our being swamped with incompetence"[28] through the birth of more defective children. If the population of the United States reaches a point where the birth of every child is considered a threat to the general welfare, the reasoning used in Buck may justify compulsory controls.

Legal Recognition Of The Problem

What we have seen in the preceding sections is that any compulsory population control measures must be based on the fact that a vital compelling state interest is to be protected. In chapter 1 we noted how excessive population growth was affecting both our privacy and our environment. The law provides us with methods of protecting these things to some extent. (The law of nuisance mentioned in chapter 2 is one example). The acceptance of a mandatory population program, then, depends mainly upon the extent to which the danger which population growth poses to our privacy and our environment (and therefore our well-being) can be integrated into our legal concepts which protect them.

Griswold v. Connecticut, which established the right to marital privacy contains some ideas about general privacy

in conduct of marital relations, but to the right to be let alone. Mr. Justice Douglas, in the majority opinion, found that the Connecticut statute transgressed a zone of privacy protected by the Constitution. Although this right to privacy is not specifically mentioned in the Constitution, the Court found that such a right could be implied:

> Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance ... Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one ... The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."30

Justice Douglas thus found that in order for many guaranteed rights to have any meaning, certain peripheral rights must be implied. For instance, while the First Amendment guarantees freedom of religion, it does not explicitly guarantee anyone the right to send his children to parochial rather than public schools. Even so, the Court held that efforts by the state to coerce children into the public school system were an invasion of First Amendment rights.[31] Similarly those above-mentioned Amendments contain guarantees which are dependent upon an idea of privacy, and marital privacy certainly falls under the "penumbras" thusly created.

There is, however, no all-encompassing right to

privacy. "Virtually every governmental action interferes with personal privacy in some degree"[32] But what "life and substance"[33] do our guaranteed rights have if we are left with an environment which cannot sustain us? All other rights are meaningless without a healthy environment. E.F. Roberts, commenting on the crowded conditions of the city says:

> In a real sense, therefore, a reflective citizen must begin to sense that he is trapped in a deteriorating environment. A future in which he is condemned to live indoors and travel in air-conditioned corridors, subject at the same time to food rationing, is not totally impossible. This is all the more absurd because the economy holds the promise of increasing leisure, what with a forty week, four day work cycle. His potential right to privacy turns out, therefore, to be the right to enjoy his coming encapsulation away from the wasteland that once was his natural environment.[34]

Surely there is a right to privacy which guards us against such pressures that a growing population brings.

A series of events and court decisions suggests that we are moving toward recognition of a constitutionally protected environment. If this were so, the government might have a compelling interest in preserving it and may therefore control the growth of population which is in part responsible for its deterioration.

The Fifth Amendment prohibits the federal government from depriving any person of property without due process of law, and from taking private land for public use without just compensation for the owner. The Fourteenth Amendment, through its due process clause, forbids state governments the same. A person's property is thus considered private

and beyond the reach of the government. In chapter 2 we saw that the law of nuisance is a way in which property is protected against private sources of annoyance. The courts, in nuisance cases, would "balance the equities" to determine the reasonableness of the use to which one's property was put. The adequacy of such a doctrine for protecting personal privacy and the environment is questionable, as evidenced in the New York Court of Appeals case Boomer v. Atlantic Cement Co.[5] There the court refused to issue an injunction because it would close down a plant worth more then $45 million and employing over 300 people. It instead awarded the plaintiffs $185,000 in damages, which was not the total damage caused by the plant.[36] Eva and John Hanks point out that this in effect amounts to a "condemnation of private property for a private use by private individuals who do not have the power of eminent domain. Since the Fifth Amendment permits the taking of private property only for a 'public use,' it prohibits by implication, condemnation for 'private objects'."[37] Clearly, the situation protrayed in Boomer is inequitable - privacy is not adequately protected.

Nuisance actions are also ineffective in maintaining the quality of the environment. Private nuisance actions fail for the reasons stated above; the environment does not benefit from a payment of damages to the plaintiff. Public nuisance actions are generally futile, for citizens or taxpayers cannot bring an action against a public nuisance as such.[38] Most suits in which citizens ask for an order

to require public officials to perform their duties (mandamus) and act against public nuisances have failed.[39]

Zoning was seen by local governments as a step by which the need for nuisance actions could be reduced or eliminated. This practice of ordering land use fails to solve the environment's problem, for the types of pollution we are concerned with do not obey the boundaries set by zoning ordinances. In fact, inhabitants of a different municipality altogether may suffer serious consequences as a result of a lawful industry carrying on its activities in quality of the environment is to be protected, clearly a means other than nuisance actions or zoning is necessary.

To be effective against environmental deterioration, pollution and other degradations must be stopped before they begin. Congress has recognized this and the National Environmental Policy Act. of 1969 [40] takes this approach:

> The Congress authorizes and directs that, to the fullest extent possible ... the policies. regulations, and public laws of the United States shall be interpreted and administered ... (sec. 102)
> ... to the end that the Nation may
> (1) fulfill the responsibility of each generation as trustee of the environment for succeeding generations; (sec. 101 (b) (1))
> (2) assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings (sec. 101 (b) (2))
>
> * * *
>
> The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. (sec. 101 (c))

Section 101 (c) recognizes a "legal right" to a healthful environment. This could "in certain circumstances, preclude any balancing or weighing of interest during the governmental decision-making process: in some situations no amount of dollars will outweigh the threat to life."[41] The Supreme Court has not yet been called upon to expound, but when it is, the right may find a constitutional as well as a statutory basis.

The courts, independently of Congress, have been advancing in their ideas about environmental protection. When a citizen group tries to intervene in an administrative proceeding or seeks relief on behalf of a public interest it is usually challenged on the grounds that it lacks standing to sue. Traditionally, in order to be considered by the court as a party which can bring an action, one must demonstrate sufficient stake in the outcome as a result of an injury suffered.[42] In recent years, however, the courts have shown willingness to relax these requirements of standing in environmental cases. In Scenic Hudson Preservation Conference v. FPC,[43] the Court of Appeals for the Second Circuit held that a statute may create new rights or interests and thus give standing to one who would otherwise be barred by the "case or controversy" requirement of the Constitution. In Citizens Committee for the Hudson Valley v. Volpe [44] the same court specifically held that two organizations, an unincorporated citizens committee and the Sierra Club, had standing although admittedly they had no personal

economic claim to assert.

Next, the Supreme Court, in Association of Data Processing Service Organizations v. Camp[45] and Barlow v. Collins [46] seemingly adopted a new approach to the standing problem. First the plaintiff must show "injury in fact, economic or otherwise" (Data Processing) or "personal stake and interest" (Barlow). Next, it must be determined that the plaintiff seeks to protect an interest "arguably within the zone of interests to be protected or regulated" by the statute in question (Barlow). The Court cited Scenic Hudson to show that the interests protected need not be economic, but can reflect aesthetic and conservational values as well.

The implications of these decisions is great. The willingness of the courts to accept lower standing notions suggests that if a plaintiff can present minimal evidence that he was intended to be protected by the statute, he is in court. He can then argue fully the existence of a legally protected interest. This seems to show the courts realization of a right to a decent environment.

The Supreme Court, in 1972, however, in a stunning decision, dealt a severe setback to environmentalists. In Sierra Club v. Morton[47], they refused standing to the Sierra Club when the Club attempted to stop Walt Disney Enterprises from developing the Mineral King Valley. The Court stated that the petitioner did not allege that the challenged activity would affect the club or its members in their activities, but maintained that the project would

adversely change the area's aesthetics and ecology. It was held that the Club lacked standing because it failed to assert individualized harm to itself or its members. Referring to the Court of Appeals for the Second Circuit in Citizens Committee, the Court said that their theory of standing "reflects a misunderstanding of our cases involving so-called 'public actions' in the area of administrative law."[48] Therefore, we see in Sierra Club v. Morton, that the law must advance still further if we are to enjoy a constitutional right to a healthy environment.

Needed Developments

Professor Christopher Stone wrote a brilliant essay, which first appeared in 1972 in the Southern California Law Review, which argues for the revolutionary concept of affording legal rights to natural objects. In Should Trees Have Standing?[49] he suggests the implications of such a move. For a thing to be the holder of legal rights, says Stone it means (a) the thing can institute legal actions at its behest, (b) in determining legal relief, the court must take injury to it into account, and (c) the relief must run to the benefit of it.[50] Toward having standing in its own right, a "friend" of a natural object should be allowed to apply to a court for the creation of a guardianship if the object is perceived to be endangered. The guardian should then have the power to raise the objects' rights before a court. If and when judgements are made

in favor of the object, rather awarding damages to the guardian, the award should go to the object, in the form of a trust fund to be administered to preserve it. Merely holding legal rights, Stone goes on, is meaningless unless these rights have substance and are enforced. One way to ensure this would be to compel courts "to make findings with respect to environmental harm - showing how they calculated it and how heavily it was weighed - even in matters outside the present Environmental Protection Act."[57] This would be a kind of "judicial Environmental Impact Statement." The appellate courts, through review, would thus give content to a body of environmental rights, much as content has been given, over the years, to terms like "Due Process."[52]

The question may be asked of the necessity to introduce such a notion as trees or rivers having rights. Instead it could be simply stated for instance, that "those people who are competent to raise the issue of water pollution ought to have standing," and that "judges ought to consider the environmental impact of actions." Would we not reach the same results? Why confuse matters with a novel concept of "rights" for trees?

Stone claims it is not the same to suggest that introducing the idea of the "rights" of trees would accomplish nothing more than the introduction of a new set of particular rules like those suggested above:

> In a system which spoke of the environment "having legal rights, judges would ... be inclined to interpret rules such as those of burden of proof far more

> liberally from the point of the environment. There is, too, the fact that the vocabulary and expressions that are available to us influence and even steer our thought ... new insights come to be explored and developed. In such fashion, judges who unabashedly refer to the "legal rights of the environment" would be encouraged to develop a viable body of law - in part simply through the availability and force of the expression. Besides ... a society that spoke of "legal rights of the environment" would be inclined to legislate more environment - protecting rules by formal enactment.[53]

Were we to follow Professor Stone's advice and grant natural objects legal rights, our body of law would be ready to recognize the constitutional right of the people to a decent environment, and by implication be able to enforce that right by legislation. The overriding state interests in protecting our constitutionally guaranteed rights to privacy and a decent environment would justify the interference with the right of procreation which compulsory population measures bring about.

NOTES

1. Kansas v. Colorado 206 U.S. 46 (1907)
2. Id. at 90
3. Perez v. United States 402 U.S. 146 (1971)
4. Id. at 52
5. see Miller, Arthur S. and John H. Davidson, Jr. "Observations on Population Policy-making and the Constitution" 40 George Washington Law Review 618. (1972)
6. Hamilton, Alexander, The Federalist Papers no. 33 (Mentor 1961) pp. 201-206.
7. Freidrich, Carl J. CONSTITUTIONAL REASON OF STATE 4-5 (1957)
8. Korematsu v. United States 323 U.S. 214 (1944)
9. Id. at 219-20
10. Home Building & Loan Association v. Blaisdell 290 U.S. 398 (1934)
11. United States Constitution, Article I, section 10, paragraph I.
12. 290 U.S. at 425
13. Id. at 440
14. Id. at 443-44
15. Skinner v. Oklahoma 316 U.S. 535 (1942)
16. Id. at 541
17. Griswold v. Connecticut 381 U.S. 479 (1965)
18. Cantwell v. Connecticut 310 U.S. 296 (1940)
19. Id. at 303
20. Buck v. Bell 274 U.S. 200 (1927)
21. Id. at 207
22. Id.
23. See text, infra, accompanying n. 28
24. See Miller, supra, p. 646

25. 316 U.X. 535

26. Id. at 541

27. Id.

28. 274 U.S. at 207

29. Griswold is interesting in that it protects the right of marital privacy in the context of making a decision to use contraception, and thus not have a child. This is because it concerns no one but husband and wife. It can be argued that since the decision to have a child does concern others (i.e. contributes to the population problem) it is not a private matter, and therefore is not covered by the decision.

30. 381 U.S. at 484

31. Pierce v. Society of Sisters 268 U.S. 510 (1925)

32. Katz v. United States 389 U.S. at 351 n. 5 (1967)

33. 381 U.S. at 484

34. Roberts, E.F. "The Right to a Decent Environment" Law and the Environment (Walker &Co. 1970) p. 152.

35. Boomer v. Atlantic Cement Co. 257 N.E. 2d 870 (1970)

36. Hanks, Evatt and John L. "The Right to a Habitable Environment." The Rights of Americans, Dorsen, Norman, ed. (Vintage Books 1972) p. 148.

37. Id.

38. Jaffe, Louis "Standing to Sue in Conservation Suits" Law and the Environment, supra, p. 131

39. Id.

40. 83 Stat. 852 (1970)

41. Hanks, supra, p. 165

42. see Baker v. Carr 369 U.S. 186 (1962)

43. Scenic Hudson Preservation Conference v. FPC 35y F2d 608 (2d Cir. 1965), cert denied, 384 U.S. 941 (1966)

44. Citizens Committee for the Hudson Valley v. Volpe, 425 F2d 97 (2d Cir. 1970)

45. Association of Data Processing Service Organization v. Camp 397 U.S. 150 (1970)

46. Barlow v. Collins 397 U.S. 159 (1970)

47. Sierra Club v. Morton complete text in Stone, Should Trees Have Standing? infra

48. Id. at 67

49. Stone, Christopher, Should Trees Have Standing? (William Kaufman Publisher 1974)

50. Id. at 11 Note: Corporations, trusts, and municipalities are some inanimate objects which already possess rights.

51. Id. at 38

52. Id.

53. Id. at 41-42

CHAPTER FOUR. CONCLUSIONS

The idea of compulsory population control seems offensive because it is an idea which has never before been seriously considered. The simple fact that mandatory measures would infringe on the right of procreation is not sufficient cause to dismiss it as wrong. The common concept of liberty in society has incorporated in it an implicit acceptance of a large degree of behavioral controls--those which are necessary to insure the individual's ability to exercise his own freedom. Cranston's idea of descriptive content of liberty v. emotive content is helpful in understanding this. Those controls on our actions which seem to us to be logical in societal context--those which do not require a major change in our manners--tend to go unchallenged. Because of their seeming logic, the illusion of total freedom remains unshattered.

The time has indeed come when the descriptive content of our liberty must again take a new form. The pressures which excessive population growth is exerting on both our ecological balance and our social well-being demands immediate action if we are to preserve the freedom of the individual. The idea of restricting one right in order to guarantee the opportunity to exercise others is not new--it is, in fact, the basis upon which societies are built. As demonstrated by Locke, Mill and Durkheim, above, a state without the power to so regulate is also powerless to protect the interests of

its citizens. Presently, our privacy and our environment are being threatened by over-population, and the government must act.

It is improbable, today, that the Supreme Court would validate any compulsory population control measure. Given our present concepts of personal privacy and of environmental quality, the Court may not recognize the necessary "compelling state interest" which is needed in order to interfere with a right as basic as that of procreation. The Court in Griswold established a right to marital privacy which may be seen as a shield which would protect husband and wife from governmental interference in the form of compulsory controls. This idea of privacy is clearly a barrier to mandatory measures. Furthermore, in Sierra v. Morton, the Court advanced a notion which reversed a trend in the lower courts, and makes it evident that a constitutional right to a decent environment is not about to be recognized.

These barriers, however, are not insurmountable. Griswold cannot be interpreted as a license to reproduce regardless of the consequences for society. What is protected is the sanctity of a private relationship which concerns two people: husband and wife. Their own decision to use a means of contraception, and thereby not have a child, is beyond control. Griswold does not grant a right to commit acts which have the effect of depriving others of the ability to exercise their rights. Excessive numbers of births must be seen as having this effect, and as Parson's anecdote about the citizens

of Fertilia shows us, individual couples are to blame. Furthermore, not only can Griswold be discounted as a "shield" from population control, it can be viewed as a "sword" for such policies. It unfolds an idea of privacy which is useful in justifying the needs for limiting our growth. The Court speaks of "peripheral" rights, rights which give fundamental, stated rights substance and meaning. From this construction, it is not hard to see that our right to privacy is being threatened by our increasing population. What substance does our right to privacy have if we are forced to live in crowded cities against our will, to ride subways jammed with people, to breathe air polluted by others who have no concern for our well-being...? Griswold implies a right to privacy which is meaningless if we are to look forward to more and more people. It may be argued, in fact, that Griswold implies a right to population control.

In this context, one must conclude that the Supreme Court erred in its findings in Sierra v. Morton. Congress, through the National Environmental Policy Act of 1969, and lower courts, in a train of decisions leading up to Sierra, have shown a realization of a possible constitutional right to a decent environment. The Supreme Court, in Sierra, made it clear that it would not right now recognize that right.

Although the Supreme Court is judicial by nature, few would disagree with the assertion that its decisions often have the effect of making policy. The Court, however, is

an instument, not a cause, of social change. We must agree with Felix Cohen when he says:

> When we recognize that legal rules are simply formulae describing uniformities of judicial decision, that legal concepts like-wise are patterns or functions of judicial decisions, that decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences, then we are ready for the serious business of appraising law and legal institutions in terms of some standard human values. (Cohen, "Transcendental Nonsense and the Functional Approach" 35 Colum.L. Rev. 809,847 (1935))

The rules and concepts adopted by the Court are not formed in a vacuum. The attitudes of the public, through the laws which are passed, the briefs that are presented, and the arguments that are offered, to the Court necessarily influence the manner of judicial thought. The fear which Justice Blackmun, in his Sierra dissent, is a real one which has been overcome in the past, and must be reckoned with now:

> Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues? (quoted by Stone, p. 89)

To ask, therfore, of the present constitutionality of compulsory population limitation is useless. Today's concepts, probably, would dictate a finding of illegality--politically and socially, such control is infeasible. It is in the context of the future setting that such a policy must be hypothesized. The very fact that legislation had been enacted would signify a great change in political and social sentiment. The vast conglomeration of forces working to make the passage of such laws possible would show us that the public

would be ready to accept population limitation.

We must therefore conclude that, ultimately, the Supreme Court would not bar mandatory population limitation measures. To arrive at that point, though, calls for a change in our conception of personal privacy, individual liberty, and environmental quality, and the relationship which excessive population growth has to these. Once the initial fear of the idea of compulsory limitation is overcome, and we begin to examine the idea on its merits, we will see that the required change is not so great, and that population control is not much different from the other kinds of social controls which government enforces and we accept.

We will come to realize that such control will make us free.

BIBLIOGRAPHY

Aristotle, Politics (Everyman's edition, Book5)

Black, Black's Law Dictionary

Cranston, Maurice Freedom, A New Analysis (Pemberton Publishing Co. 1953) p. 21

Davis, Kingsley "Population Policy: Will Current Programs Succeed?" Science, 158, November 10, 1967

Franklin, Benjamin "Essay on the Increase of Manking" (1751)

Freidrich, Carl J. CONSTITUTIONAL REASON OF STATE (1957)

Hanks, Evatt and John L. "The Right to a Habitable Environment," The Rights of Americans, Dorsen, N. ed. (Vintage Books 1972)

Locke, John Two Treatises of Government (Mentor 1965)

Malthus, Thomas R. Essay on Population (MacMillan & Co. Ltd. 1798)

Meadows, Dennis et al. The Limits to Growth (Universe Books 1972)

Mill, John S. "Essay on Liberty" Harvard Classics v. 25 (P.F. Collier & Son 1937)

Parsons, Jack Populations vs. Liberty (Pemberton Books, 1971)

Stone, Christopher Should Trees Have Standing? Toward Legal Rights for Natural Objects. (William Kaufmann 1974)

"United States Commission on Population Growth and The American Future" (U.S. Government Printing Office 1972)

United States Constitution

United Stated Declaration of Independence

TABLE OF CASES

Association of Data Processing Service Organization v. Camp 397 U.S. 150 (1970)

Baker v. Carr 369 U,S. 186 (1962)

Barlow v. Collins 397 U.S. 159 (1970)

Board of Health v. New York Central Railroad 90 A.2d 729 (1952)

Boomer v. Atlantic Cement Co. 257 N.E. 2d 870 (1970)

Borgnemouth Realty Co. Ltd. v. Gulf Soap Corp. 212 La. 57

Buck v. Bell 274 U.S. 200 (1927)

Cantwell v. Connecticut 310 U.S. 296 (1940)

Citizens Committee for the Hudson Valley v. Volpe 425 F.2d 97 (2d Cir. 1970)

Griswold v. Connecticut 381 U.S. 479 (1965)

Hofstetterv. George M. Myers Inc. 228 p2d 522 (1951)

Home Building & Loan Association v. Blaisdell 290 U.S. 398 (1934)

Judson v. Los Angeles Suburban Gas Co. 106 p. 581 (1910)

Kansas v. Colorado 206 U.S. 46 (1907)

Katz v. United States 323 U.S. 214 (1944)

Korematsu v. United States 323 U.S. 214 (1944)

Madison v. Ducktown Sulphur, Copper & Iron Co. Ltd. 83 S.W. 658 (1904)

Pierce v. Society of Sisters 268 U.S. 510 (1925)

Penn-Dixie Cement Corp. v. Kingsport 225 S.W. 2d 270 (1949)

Perez v. United States 402 U.S. 146 (1971)

Skinner v. Oklahoma 316 U.S. 535 (1942)

Sierra Club V. Morton 405 U.S. 727 (1972)

Sohn v. Jensen 11 Wis. 2d 449

Tuebner v. California St. R.R. Co. 4 p. 1162 (1884)

Village of Euclid v. Ambler Realty Co. 272 U.S. 365 (1926)